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In The

Supreme Court of the United States

October Term, 1998

MARICOPA-STANFIELD IRRIGATION and DRAINAGE DISTRICT, a municipal corporation of the STATE OF ARIZONA; CENTRAL ARIZONA IRRIGATION and DRAINAGE DISTRICT, a municipal corporation of the STATE OF ARIZONA; NEW MAGMA IRRIGATION & DRAINAGE DISTRICT, a municipal corporation of the STATE OF ARIZONA,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

AMICUS CURIAE BRIEF OF CENTRAL VALLEY PROJECT WATER ASSOCIATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does a contract clause providing that the United States "assumes no responsibility with respect to the quantity of water available for delivery" excuse the government from liability where the government determines to reallocate the water to another user?

2. Are the rights to water provided by Reclamation pursuant to contract protected property of the landowners?

3. Is the Ninth Circuit's application of the "unmistakability doctrine" to absolve the government from liability when Congress reallocates previously contracted-for water to another use consistent with this Court's decision in *United States v. Winstar Corp.*, 518 U.S. 839 (1996)?

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INTEREST OF THE AMICUS CENTRAL VALLEY PROJECT WATER ASSOCIATION[1]

The Central Valley Project Water Association (CVPWA) is a voluntary organization of local government agencies and public utilities who hold contracts with the United States Bureau of Reclamation (Reclamation) for Central Valley Project (CVP) water. Contracts held by CVPWA members account for the majority of CVP water delivered for irrigation and municipal and industrial purposes. The federal Central Valley Project services agricultural, municipal and industrial water and power customers throughout the Central Valley from Redding to Bakersfield. CVP contractors have a responsibility to provide reliable and affordable water service to over 20,000 farms on three million acres of the nation's most productive farmland, and to two million households and industrial water users. CVP contracts were executed for the express purpose of meeting those responsibilities. Fulfillment of that obligation is the most critical charge to all of the CVP's contractors.

The Ninth Circuit Court of Appeals' decision may directly and adversely affect the member entities of the CVPWA. The CVPWA member entities' contracts contain certain provisions similar to those of the contractors at

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[1] Petitioners, Maricopa-Stanfield Irrigation and Drainage District, Central Arizona Irrigation and Drainage District, and New Magma Irrigation and Drainage District, and Respondent, United States of America, have consented to the filing of this brief. Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

issue in this case. Unless reviewed and overturned, the Secretary of the Interior, through Reclamation, will have virtually unfettered discretion to reallocate water in which contractors have a protected property interest without just compensation. The CVPWA has a duty to speak on behalf of its members to ensure that their beneficial interest in water is fairly considered by Reclamation as it operates federal reclamation facilities.

STATEMENT OF THE CASE

Amicus Curiae adopts the Statement of the Case set forth in the Petition for Certiorari.

SUMMARY OF THE ARGUMENT

The Ninth Circuit Court of Appeals' decision potentially affects federal contractors throughout the western United States under the federal Reclamation Program. If the decision is left standing without review, Reclamation will continue to unilaterally reallocate previously contracted-for water, thereby impairing protected property interests without providing just compensation.

In reaching its decision, the court of appeals has overlooked fundamental reclamation law concerning the nature and extent of the beneficial interest in water held by federal contractors under the Reclamation Program.

Furthermore, the court of appeals has misapplied the doctrine of mistakability by failing to follow this Court's decision in *United States v. Winstar Corp.*, 518 U.S. 839

(1996). The court of appeals blurred the line between Reclamation's proper exercise of sovereign authority and its proprietary role as a party to a contract.

REASONS FOR GRANTING THE WRIT

I. THIS CASE HAS BROAD IMPLICATIONS AFFECTING THE PROPERTY INTEREST OF FEDERAL RECLAMATION CONTRACTORS THROUGHOUT THE WESTERN UNITED STATES

Ninety-seven years ago, Congress initiated a program by enacting the National Reclamation Act of 1902, 32 Stat. 388 (codified at 43 U.S.C. § 372 *et seq.* (1902)) which forever changed the western United States. It was the final expansion of our Nation into the lands beyond the hundredth meridian of longitude.

The participants in this expansion faced many challenges. Unlike the eastern United States, much of the land was so arid that irrigation was an absolute necessity to grow crops. Thus, to entice the settlement, reclamation, and economic development of that arid portion of the American West, for the recognized benefits to the United States, Congress devised a federal program to make water available through the construction of large-scale water projects.

The goals of the federal reclamation program were best summarized by one of its most vigorous advocates, President Theodore Roosevelt:

> The Reclamation and settlement of the arid lands will enrich every portion of our country,

> just as the settlement of the Ohio and Mississippi Valleys brought prosperity to the Atlantic states. The increased demand for manufactured articles will stimulate industrial production, while wider home markets and the trade of Asia will consume the larger food supplies and effectually prevent Western competition with Eastern agriculture. Indeed, the products of irrigation will be consumed chiefly in upbuilding local centers of mining and other industries, which otherwise would not come into existence at all. Our people as a whole will prosper, for successful home-making is but another name for the upbuilding of the nation.[2]

The Central Valley Project in California is the largest of the reclamation projects authorized by Congress. This gigantic undertaking was developed to redistribute the water resources of California. "It was born in the minds of far-seeing Californians in their endeavor to bring the State's parched acres a water supply sufficiently permanent to transform them into veritable gardens for the benefit of mankind." *Ivanhoe Irrigation District v. McCracken*, 357 U.S. 275, 280 (1957).

The two parallel ranges of mountains that run south from California's northern border for two-thirds the length of the State form the Central Valley Basin. The Sierra Nevada Mountain Range lies to the east and the Coast Range lies to the west. They converge in the north at Mount Shasta and are joined by the Tehachapi Mountains to the south. The Sacramento River forms at the

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[2] Message to Congress of December 3, 1901, Reprinted at Congressional Record – House, May 5, 1982 at 1837 (Remarks by Representative Pashayan).

headwaters near Mount Shasta and flows approximately 400 miles south into the San Francisco Bay. The San Joaquin River rises in the south and joins the Sacramento River in the Sacramento-San Joaquin Delta.

The CVP was built around these two rivers. *See United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 728-229 (1949) for a full description of the CVP. The water storage and delivery system of the CVP covers 35 of the State's 58 counties. It includes 20 reservoirs, with a combined storage capacity of approximately 11 million acre-feet; 8 power plants; 2 pumping plants; and approximately 500 miles of major canals and aqueducts.

The CVP supplies water to more than 250 long-term water contractors in the Central Valley, the Santa Clara Valley and the San Francisco Bay Area. Total annual contracts exceed 9 million acre-feet of water.

Most CVPWA member entities have entered into long-term repayment or water service contracts with the United States through Reclamation pursuant to the Reclamation Project Act of 1939, 53 Stat. 1187 (codified at 43 U.S.C. § 485 *et seq.* (1939).) The remaining members have entered into exchange or water right settlement contracts with Reclamation[3]. Most of the member entities' contracts contain provisions similar to those of the contractors in this case.[4]

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[3] These contracts, in essence, recognize the prior vested, state-granted water rights of those specific contractors.

[4] Many of the long-term water service contracts for CVP water have expired. Pursuant to the Project Act of 1956, 70 Stat. 483 (July 2, 1956), codified at 43 U.S.C. § 485h-4 and the express

For instance, the long-term water service contract between the United States and Orange Cove Irrigation District states at Article 10 (a):

> In its operations of the Project, the United States will use all reasonable means to guard against a condition of shortage in the quantity of water to be made available to the Contractor pursuant to this contract. Insofar as determined by the Contracting Officer to be practicable the United States will, in the event a shortage appears probable, notify the Contractor of such determinations as soon as possible. Nevertheless, if there is a reduction in the total water supply available to the Contractor during any year, because of drought or other unavoidable causes, no liability shall accrue against the United States or any of its officers, agents, or employees for any damage, direct or indirect, arising therefrom.

The Ninth Circuit Court of Appeals' decision advances significant legal precedent potentially much broader in its impact than the specific facts of the case. In California, there are striking similarities to what has

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terms of the contracts, water users have a first right to renew their contracts. Because of the limitations and directives contained in the CVPIA, upon expiration of their long-term CVP contracts, contractors entered into "interim" contracts that serve as placeholders until new long-term contracts can be negotiated and executed. Reclamation is expected to begin negotiation of renewal of long-term water service and repayment contracts later this year. Review of this case may clarify significant outstanding issues regarding the nature and extent of the federal reclamation contractors' property interest in water acquired under the original contracts thereby facilitating the negotiation process for hundreds of federal reclamation contractors.

occurred in Arizona. The Secretary of the Interior, through Reclamation, is making important water operation and management decisions affecting hundreds of federal reclamation contractors. Instead of integrating omitted Indian water rights into Central Arizona Project contract administration, as was the case in Arizona, the Secretary in the CVP California situation has unilaterally reallocated water from its contracted uses to the new uses for environmental purposes. Whether in Arizona or California, the result is the same, federal contractors are being denied critical water deliveries. They alone are bearing the burden of inadequate water supplies despite having vested property rights in the water being reallocated. If the court of appeals' decision is left as it stands, the government will be relieved of its contractual obligation and absolved of any liability.

In 1992, Congress enacted the Central Valley Project Improvement Act (CVPIA), Pub. L. No. 575, 106 Stat. 4706, §§ 3401-3412 (1992). Among its many purposes, the CVPIA specifically dedicated 800,000 acre-feet of project yield for implementing the fish, wildlife and habitat restoration purposes authorized by the act; to assist California in its efforts to protect the waters of the San Francisco Bay/Sacramento-San Joaquin Delta; and to meet obligations imposed on the project under the federal Endangered Species Act (ESA). CVPIA § 3406(b)(2). Additional water was also dedicated in the CVPIA to restore flows in the Trinity River and to provide a firm supply of water for habitat in the National Wildlife Refuge System in the Central Valley of California. CVPIA § 3406(b)(23) and CVPIA § 3406(d).

Using the water specifically allocated by Congress and water acquired through purchase, lease or by options on water, the Secretary was also authorized to provide flows to protect and enhance California's fishery resources; provided, however, that the use of water from these other sources did not conflict with the Secretary's ability to fulfill its contractual obligations to provide CVP water for other authorized purposes. CVPIA § 3406(b)(1)(B).

There are parallels between the San Carlos Apache Tribe Water Rights Settlement Act and the CVPIA, in that both have been used by the Secretary to effect a reallocation of water. In the case of the CVPIA, the reallocation of water has been exacerbated by the manner in which Reclamation has operated the CVP. Even though the last several years have been among the wettest years on record, in some of those years federal reclamation contractors have received only a portion of the water they hold under contract. Unless the Secretary is constrained to exercise balance and restraint, the federal reclamation contractors will continue to be significantly affected.

The decision of the court of appeals encourages the Secretary of the Interior to act as if he has unfettered discretion to unilaterally modify contractual obligations. The decision potentially impacts all federal reclamation contractors, not simply the non-Indian agricultural users of the Central Arizona Project. If not held to an even-handed balanced exercise of discretion, Reclamation will be encouraged to snuff out the property rights held by those same contractors. The decision also undermines the certainty of a water supply that is essential to the continued economic prosperity of the western United States.

In *Ivanhoe Irrigation District v. McCracken*, 357 U.S. 275, this Court deferred answering the question of title to reclamation facilities on the assumption that it was "highly improbable" that Congress or the government would trample on the property rights of the federal reclamation contractors. As noted by this Court, it did not seem untoward that the people who benefited so greatly from the construction of these projects should "depend in small measure" on the beneficence of the government.

> [I]t seems farfetched to foresee the Federal Government "turning its back upon a people who had been benefited by it" and allowing their lands to revert to desert. The prospect is too improbable to figure in our decision.

Id. at 299-300.

Despite how farfetched it may have seemed to this Court in 1957, the court of appeals, by misconstruing the protected property interests of the federal reclamation contractors, has concluded that the government is, in fact, not bound by the promises earlier made.

II. CONTRARY TO DECADES OF THIS COURT'S OPINIONS, THE COURT OF APPEALS' DECISION APPEARS TO HAVE ABOLISHED FEDERAL RECLAMATION CONTRACTORS' PROTECTED PROPERTY INTEREST IN THE WATER

The court of appeals overlooked fundamental reclamation law when it determined that the districts did not have a protectable property interest pursuant to their federal reclamation contracts. In reaching its conclusion, the court of appeals ignored numerous decisions by this

Court upholding the vested rights of federal contractors in water diverted and distributed by Reclamation.

A fundamental tenet of reclamation law is found in section 8 of the Reclamation Act of 1902. It states, in pertinent part, that "[t]he right to the use of water acquired under this provision of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right." 43 U.S.C. § 372. Time and again, this Court has construed section 8 to mean that the rights to water provided by Reclamation are the property of the landowners who put that water to beneficial use.

The question of beneficial ownership of water rights acquired for the operation of projects constructed by Reclamation was first addressed by this Court in *Ickes v. Fox*, 300 U.S. 82 (1937). Although the Court acknowledged the government's role in diverting, storing and distributing the water, the Court concluded that such appropriations were not made for the use of the government. Those diversions were made for the use of the landowners. "[T]he water rights became the property of the landowners, wholly distinct from the property right of the government in the irrigation works." *Id.* at 95.

The Court went on to explain that Congress by the Desert Land Act of 1877, 19 Stat. 377 (codified at 43 U.S.C. § 321, *et seq.*), severed the land and water constituting the public domain and established the rule that lands should be patented separately from the water. The water was reserved for the use of the public under the laws of the various states. The Court recognized that the various states having reclamation projects had long established

laws pertaining to the acquisition of water. Under those laws, the right to use water could only be acquired through beneficial use. Once acquired, the right to use the water appropriated is a vested property right. Thus, the Court concluded that landowners receiving water from Reclamation obtained a property right in the water by state law and "by express provision of the Reclamation Act as well." *Ickes v. Fox*, 300 U.S. at 95-96.

Again this Court took up the issue of ownership of water developed by Reclamation in *Nebraska v. Wyoming*, 325 U.S. 589 (1945). In that case, Reclamation claimed ownership of all unappropriated water in the Platte River. In rejecting the argument of the United States, this Court went on to address the nature and extent of the rights acquired by Reclamation when it developed the North Platte Project and the Kendrick Project.

Relying on section 8 of the Reclamation Act of 1902, and its previous decision in *Ickes v. Fox*, this Court reiterated its finding that the landowners hold vested property rights in the water contracted for with the United States.

> The government was and remained simply a carrier and distributor of the water, with the right to receive the sums stipulated in the contracts as reimbursement for the cost of construction and annual charges for operation and maintenance of the works.
>
> The property right in the water right is separate and distinct from the property right in the reservoirs, ditches or canals. The water right is appurtenant to the land, the owner of which is the appropriator. The water right is acquired by perfecting an appropriation, i.e., by an actual

> diversion followed by an application within a reasonable time of the water to a beneficial use. Indeed § 8 of the Reclamation Act provides as we have seen that the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right.

Nebraska v. Wyoming, 325 U.S. at 614, internal citations and quotations omitted.

More recently, this Court took up the question in *United States v. Nevada*, 463 U.S. 110 (1983). In that case, the decision of the court of appeals permitted a reallocation of water decreed in the Orr Ditch by Reclamation from irrigation to the Pyramid Indians. In overruling the court of appeals, this Court clearly stated that if it allowed the decision to stand, it would be striking out half a century of decided case law relating to the Reclamation Act of 1902 and the water rights in the public domain of the West.

After summarizing its previous decisions in *Ickes v. Fox* and *Nebraska v. Wyoming*, the Court went on to state that the law of Nevada was common to most other western States. To perfect a water right, the water must be beneficially used by actual application of the water on the land. The water right is appurtenant to the land on which it is used. *United States v. Nevada*, 463 U.S. at 125.

Emphasizing its unfaltering position, the Court chastised Reclamation, stating:

> [T]he Government is completely mistaken if it believes that the water rights confirmed to it by the Orr Ditch decree in 1944 for use in irrigating

> lands within the Newlands Reclamation Project were like so many bushels of wheat, to be bartered, sold, or shifted about as the Government might see fit.

Id.

Finding that the government's "ownership" of water rights was at best "nominal," the Court reiterated that beneficial interest in the water rights resides in the owners of the land within the project. Once project water is applied, the water rights become appurtenant to the land. Reclamation law, the federal reclamation contracts and previous case law make that finding evident.

The court of appeals completely ignored almost a century of well-established reclamation law by concluding the districts do not have a protectable property interest under their federal reclamation contracts. The court of appeals should not be allowed to abolish what this Court has repeatedly found to be the vested property interests of federal reclamation contractors.

III. THE COURT OF APPEALS IGNORED THIS COURT'S DECISION IN *UNITED STATES v. WINSTAR* BY MISAPPLYING THE DOCTRINE OF UNMISTAKABILITY

At a time when the public may have lost faith in its government, the decision by the court of appeals seems only to confirm the widely held notion that, indeed, the United States is an unreliable contracting partner. This Court has the opportunity to bolster the government's credibility and, in fact, its very ability to contract by reviewing the Ninth Circuit's faulty reasoning.

In reaching its decision, the court of appeals overlooked entirely this Court's decision in *United States v. Winstar Corp.*, 518 U.S. 839 (1996) by misapplying the doctrine of unmistakability. Without carefully examining the contracts at hand, or the relief sought, the court of appeals simply assumed that the districts were attempting to limit the exercise of sovereign power. Nothing could be further from the truth.

Federal water contractors in California do not take issue with Congress' ability to exercise its sovereign authority by enacting such legislation as the Endangered Species Act or the Central Valley Project Improvement Act. These statutes, if properly implemented, provide ample procedural safeguards for contractors to protect their proprietary interests in CVP water. Reclamation, however, has improperly blurred the sovereign exercise of power with the free-wheeling exercise of its proprietary authority in administering these contracts. In its role as a party to a contract it is not free to unilaterally operate the CVP and reallocate water otherwise under contract in anticipation of what may be required under the ESA or the CVPIA. This type of manipulation of project operation and water allocation circumvents the safeguards that would otherwise come into play if Reclamation properly separated its sovereign hat from its proprietary hat. Increasingly, over the past eight or nine years, Reclamation has, through this type of improper reoperation and reallocation, diminished and taken the valuable water rights relied upon historically by CVP contractors and the individuals and entities that they serve. This impermissible behavior not only adversely affects the lives of real people and real business but also

undermines the entire historic and legal rationale the underpins the reclamation program upon which much of the west depends.

The question of who bears the financial risk associated with these water shortages is timely. The mischief of the court of appeals' decision is permitting Reclamation to shift the public's burden of providing water to meet additional demands onto its contractual partners as a discretionary act ignoring the constraint of its existing contracts, and without consequence. That holding is directly contrary to this Court's decision in *Winstar. United States v. Winstar Corp.*, 518 U.S. at 882.

There is no doubt that Congress can change federal policy but that change of policy is not written on a blank slate. "Lives, families, businesses, and towns are built on the basis of the old policies." *Madera Irrigation District v. Hancock*, 985 F.2d 1397, 1400 (1993). The Fifth Amendment of the United States Constitution protects expectations that are reasonably based on protected property rights against policy changes. *Id.*

In *United States v. Nevada*, this Court considered Reclamation's sometimes conflicting obligations to provide water to both the Newlands Project and the Pyramid Lake Indian Reservation. Acknowledging that Congress was requiring the Secretary to fulfill the difficult task of carrying water on at least two shoulders, this Court affirmed the government's obligation to perform its responsibility without compromise to both interests. 463 U.S. at 127.

When the government finds itself unable to perform its obligations to meet the contractual entitlements of its

federal reclamation contractors,[5] then it should be required to bear the financial risk. It is the government, not the federal reclamation contractors, that must assume the cost of a change in federal policy. That is the result required by this Court's decision in *Winstar*.

Recognition of federal reclamation contractors' property interest in water is not tantamount to a surrender of sovereign authority. Nor is the payment of damages for water shortages a surrender of sovereign power. The court of appeals was required to apply ordinary principles of contract law in accordance with this Court's decision in *Winstar*. *United States v. Winstar Corp.* at 881-882. Had it done so, the court of appeals would have concluded that the government's liability did not rest in the act of the government as the sovereign but in its role as a party to a contract. The sovereign can breach a contract without calling into question its sovereign authority.

Unless this case is reviewed, the court of appeals will expansively apply the unmistakability doctrine to the ultimate disadvantage of the government. As this Court noted in *Winstar*, the government needs to be an effective contracting partner.

> Injecting the opportunity for unmistakability litigation into every common contract action

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[5] Federal reclamation contractors do not seek to shield themselves from all financial risk associated with the shortage of water. When such shortages are truly a result of drought or emergencies beyond the control of Reclamation, it is appropriate for contractors to bear those costs. Furthermore, as a contracting party, Reclamation is free to negotiate contract provisions that spread the risk among the parties or that specify appropriate remedies for future changes in circumstances.

> would, however, produce the untoward result of compromising the Government's practical capacity to make contracts, which we have held to be of the essence of sovereignty itself.

United States v. Winstar Corp., 518 U.S. at 884, citation and quotation omitted.

The court of appeals' decision undermines the government's credibility in all existing and future contracts under the Reclamation program and must be reviewed.

CONCLUSION

For all these reasons, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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